Mukundan a/l Maniam & Ors v Ratiga a/p Markandan & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–1039 OF 2007
MOHD GHAZALI, SULONG MATJERAIE AND AHMAD MAAROP JJCA
26 MAY 2009

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Civil Procedure — Parties — Locus standi — Appellants application struck off in High Court — Appellants failed to file appeal record and extension of time to file appeal record — Whether appellants could continue to be party to proceedings relying on O 15 r 6(2)(b) of the Rules of the High Court 1980

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The instant case had five notices of motion with one from the appellants and four from the respondents. The appellants had filed nine appeals on 26 October 2007 without appeal records or application for extension of time to file the appeal records which should have been done within eight weeks pursuant to r 18(7) of the Rules of the Court of Appeal 1994 ('Rules'). The appellants applied in encl 5a dated 30 November 2007, pursuant to s 44 of the Courts of Judicature Act 1964 ('Act') for a stay on all proceedings in the High Court pending disposal of the nine appeals. However, on 15 April 2008 the appellants were struck out as defendants in the counterclaim, and they were no longer were parties to the proceedings. The appellants did not appeal and on 15 September 2008, the third and the sixth appellants had withdrawn as interveners in the counterclaim. The appellants requested all the nine appeals to be heard together through one record of appeal rather than nine separate appeals as it was just and economical. The appellants submitted as there was no enabling provision in Rules and accordingly, as mandated by r 4 of the Rules, Rules of the High Court 1980 ('RHC') shall apply mutatis mutandis. Hence, the appellants opined that they remain parties to the proceeding by virtue of O15 r 6(2)(b) of the RHC. All the respondents except the twelfth respondent filed encls 13a and 15a, and the twelfth respondent filed encl 16a applying for an order to strike out the appellants' encl 5a and the nine appeals. The respondents submitted that preliminary objection had been initiated against the appellants' application. The respondents averred that although the appellants had filed nine appeals, there were no appeal records filed in respect of the appeals and no extension of time had been applied to extend time of filling. The respondents argued that the appellants were no longer parties to the proceedings in the High Court by virtue of court oder on 15 April 2008 for which they did not file any appeal against the decision.

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Held, striking out the applications with no order as to costs:

(1) Section 44 of the Act relating to incidental directions and interim orders

did not show any relevance to the argument that the appellants' application for a stay pending disposal of their appeals. Similarly, on the argument that the appellants could still be added as parties to the proceedings failed as there was no such application to do so. Hence, both the appellants arguments fail ab initio (see para 17).

(2) The appellants have conceded that they have failed to file any record of appeal and that since no application had been filed to extend time, the application as in encls 13a and 16a were allowed with costs (see para 23).

(3) In accordance with the preliminary objection, the appellants have no standing to make the application as in encl 5a. They have been struck out and not having appealed against such decision, they are no longer parties to this action (see para 24).

[Bahasa Malaysia summary

Kes ini mempunyai lima notis usul, satu daripada perayu-perayu dan empat daripada responden-responden. Perayu-perayu telah memfailkan sembilan rayuan pada 26 Oktober 2007 tanpa rekod-rekod rayuan atau permohonan untuk lanjutan masa untuk memfailkan rekod-rekod rayuan yang mana patut dibuat dalam masa lapan minggu berikutan k 18(7) Kaedah-Kaedah Mahkamah Rayuan 1994 ('Kaedah-Kaedah'). Perayu-perayu memohon lampiran 5a bertarikh 30 November 2007, berikutan s 44 Akta Mahkamah Kehakiman 1964 ('Akta') untuk penangguhan atas kesemua prosiding di dalam Mahkamah Tinggi sementara menunggu perbicaraan kesembilan rayuan tersebut. Walau bagaimanapun pada 15 April 2008 perayu-perayu dibatalkan sebagai defendan-defendan dalam tuntutan balas, dan mereka bukan lagi pihak kepada prosiding-prosiding tersebut. Perayu-perayu tidak merayu dan pada 15 September 2008 perayu-perayu ketiga dan keenam telah menarik balik sebagai pencelah-pencelah dalam tuntutan balas. Perayu-perayu memohon kesemua sembilan rayuan tersebut didengar bersama melalui satu rekod rayuan daripada Sembilan rayuan berasingan kerana ia adalah adil dan menjimatkan. Perayu-perayu berhujah memandangkan tidak terdapat peruntukan membolehkan di dalam Kaedah-Kaedah dan oleh itu, seperti yang dimandatkan oleh k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') akan beraplikasi mutatis mutandis. Maka perayu-perayu berpendapat bahawa mereka kekal pihak-pihak kepada prosiding A 15 k 6(2)(b) KMT. Kesemua responden kecuali responden ke-12 memfailkan lampiran 13a dan 15a, dan responden ke-12 memfailkan lampiran 16a memohon untuk perintah membatalkan lampiran 5a perayu-perayu dan kesemua sembilan rayuan tersebut. Responden-responden berhujah bahawa bantahan permulaan telah dimulakan terhadap permohonan perayu-perayu. Responden-responden berhujah bahawa walaupun perayu-perayu telah memfailkan Sembilan rayuan, tidak terdapat rekod-rekod rayuan difailkan berkaitan rayuan-rayuan dan tiada lanjutan masa dipohon untuk melanjutkan masa untuk pemfailan. Responden-responden berhujah bahawa perayu-perayu bukan lagi

pihak-pihak kepada prosiding di Mahkamah Tinggi berikutan perintah mahkamah pada 15 April 2008 yang mana mereka tidak memfailkan apa-apa rayuan terhadap keputusan tersebut.

Diputuskan, membatalkan permohonan tanpa perintah untuk kos:

(1) Seksyen 44 Akta berkaitan 'incidental directions and interim orders' tidak menunjukkan apa-apa kerelevanan kepada hujahan bahawa permohonan perayu-perayu untuk penangguhan sementara menunggu pendengaran rayuan-rayuan mereka. Begitu juga atas penghujahan bahawa perayu-perayu masih boleh dimasukkan sebagai pihak-pihak kepada prosiding gagal kerana tidak terdapat permohonan demikian untuk berbuat demikian. Maka kedua-dua penghujahan perayu-perayu gagal ab initio (lihat perenggan 17).

(2) Perayu-perayu telah mengaku bahawa mereka gagal untuk memfailkan apa-apa rekod rayuan dan memandangkan tiada permohonan yang telah difailkan untuk melanjutkan masa, permohonan seperti dalam lampiran 13a dan 16a dibenarkan dengan kos (lihat perenggan 23).

(3) Mengikut bantahan permulaan, perayu-perayu tidak mempunyai hak untuk membuat permohonan seperti dalam lampiran 5a. Ia dibatalkan dan dengan tidak merayu terhadap keputusan tersebut, mereka bukan lagi pihak-pihak kepada tindakan ini (lihat perenggan 24).]

Notes

For cases on locus standi, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5663–5686.

Legislation referred to

Courts of Judicature Act 1964 s 44
Rules of the Court of Appeal 1994 rr 4, 18(7)
Rules of the High Court 1980 O 15 r 6(2)(b) of the

Khabir Dhillion (Soosay Dhillion Sharma) for the first, second, fourth, fifth, seventh and eighth appellants.
Renu Zechariah (G Ragumaran & Co) for the first to 11th respondents.
S Kanaga Sundran (Raja Seelan & Associates) for the 12th respondent.

Sulong Matjeraie JCA:

[1] This is the unanimous judgment of the court.

[2] Five notices of motion were brought before this court in this instant case. These motions are at encls 5a, 11a, 13a, 15a and 16a.

[3] Enclosure 5a dated 30 November 2007 is an application filed by the applicants for *a stay on all proceedings in the High Court* pending the disposal of the appeals.

[4] Enclosure 11a dated 6 December 2007 is an application filed by the first to 11th respondents *to strike out the applicants' notices of motion for stay and for the consolidation of appeals*.

[5] Enclosure 13a dated 6 December 2007 is an application filed by the first to 11th respondents *to strike out nine appeals filed by the applicants*.

[6] Enclosure 15a and encl 16a are filed by the respondents for an order *to strike out the applicants' notice of motion filed on 30 november 2007 (encl 5a) and to strike out the nine notices of appeal* filed on 12 November 2007. Enclosure 16a was filed by the 12th respondent, a body corporate known as Manducekap Hi-Tec Sdn Bhd.

BACKGROUND

[7] Nine appeals were filed by the applicants on 26 October 2007. Neither appeal records had been filed by the applicant nor was any application for extension of time sought.

[8] By a court order handed down on 15 April 2008, all the applicants have been struck out as defendants in the counterclaim and are no longer parties to the proceedings. Similarly no appeal had been filed by the applicants against the said striking out order.

[9] The applicants No 3 and No 6 have withdrawn themselves as interveners in the counterclaim and consequently were absent at the hearing before us and they have decided not to participate in this application.

[10] Learned counsel for the respondents therefore argued that since no appeal had been filed, the applicants have no right or locus standi to apply for stay as per their application at encl 5a.

HEARING BEFORE THIS COURT

[11] On the day of the hearing, learned counsel for the first to 11th respondents informed this court that her instruction was to initiate a preliminary objection on the applications. Appropriate notices of their intention to initiate the preliminary objection had been given to the applicants.

Two points were canvassed and these are as follows:

(a) although nine appeals have been filed by the applicants on or about 26 October 2007, no appeal record had been filed in respect of those appeals. Further, it was argued that no application for extension of time had been sought by the applicants to extend time of filing. There was also no evidence produced to this court that dispensation from compliance with the appropriate Rules of the Court of Appeal 1994 had been granted by the appropriate authority. Consequently, the first to 11th respondents have filed encl 13a and the 12th respondent have filed encl 16a seeking to strike out the said nine appeals; and

(b) all the applicants are no longer parties to the proceedings as the court below had struck them out by way of a court order handed down on 15 April 2008. No appeal had been filed against this decision.

[12] In the meantime, applicants No 3 and No 6 have also withdrawn themselves as interveners in the counterclaim. It was therefore argued that the applicants have neither the right nor locus standi to seek for a stay as per their application at encl 5a.

[13] Learned counsel for the 12th respondent adopted the argument of learned counsel for the first to 11th respondents and placed on record that he was pursuing the preliminary objection against the applicants as well.

ARGUMENT OF THE APPLICANTS

[14] Learned counsel for the applicants told this court that when they filed their application at encl 5a on 30 November 2007, they were still parties to the proceedings. The applicants No 1 – No 8 with the exception of applicants No 3 and 6 were struck out by the learned High Court judge on 15 April 2008. This court has also been informed that the third and sixth applicants have also withdrawn themselves as interveners and are not parties to this proceeding before this court.

[15] Learned counsel for the applicants confirmed that no appeal was made against the decision handed down on 15 April 2008. As such that decision remains intact and binding on them.

[16] Two reasons were offered by learned counsel as to why they remain as parties to the proceeding and these are:

(a) The notice of motion at encl 5a was made pursuant to s 44 of the Courts of Judicature Act for a stay pending disposal of the nine appeals arising from the nine orders made on 22 October 2007.

(b) The applicants can still be added as parties to the proceedings. Although no relevant provision was quoted to us by learned counsel as to adding any person as a party, we are of the view that such application may be made under O 15 r 6(2)(b) of the Rules of the High Court 1980. This is because the Rules of the Court of Appeal 1994 have no enabling provision to accommodate such application. However r 4 thereof mandates that the Rules of the High Court 1980 shall apply mutatis mutandis.

[17] We have examined s 44 of the Courts of Judicature Act 1964 which relates to incidental directions and interim orders but found no relevance to the argument. Similarly, on the argument that the applicants can still be added as parties to the proceeding, we observe here that there is no such application before us. As such both arguments fail ab initio.

ADMISSION MADE BY LEARNED COUNSEL FOR THE APPLICANTS

[18] By his own admission, learned counsel for the aplicants conceded to this court that:

(a) the applicants are no longer parties to the suit at the High Court;

(b) on the preliminary objection, it was also conceded that contrary to the requirement of r 18(7) of the Rules of the Court of Appeal 1994, they failed to file the nine appeal records within the specified eight weeks; and

(c) further, it was also admitted by learned counsel for the applicants that no application had been filed to extend time to file all the nine appeals.

[19] Learned counsel however argued that although they have not applied for any extension of time it does not preclude them from making such application by way of a motion before this court. This is of course true as the filing period for the record of appeal may still be extended to such further period as the court may allow. This period cannot however be indefinite and the applicant must decide within a reasonable period of time giving reason for such an application.

REASON FOR MAKING THE APPLICATION AT ENCLOSURE 5a

[20] Learned counsel told this court the reason for his application at encl 5a can be found at prayer 3 thereof. Prayer 3 essentially was an application requesting for all the nine appeals to be heard together and with only the need to file one record of appeal rather than nine separate appeals.

[21] When asked for any rule or authority to support his contention, learned counsel argued that he was only praying to the court to invoke its inherent power as it was just and economical to do so for it would be an unnecessary waste to file nine separate appeal records.

[22] It was further argued that the motion to strike out their application is based solely on their omission to file appeal record as the appeals are competent and pending. Counsel submitted that an application to strike out should not be entertained purely on the basis of non filing of the appeal record. Learned counsel for the applicants argued that the appeals are competent.

DECISION OF THE COURT

[23] Without having the need to consider any submission on the appeal proper, this court is of the view that since learned counsel for the applicants have conceded that they have failed to file any record of appeal and that since no application had been filed to extend time, this court allowed the application for striking out the applications at encls 13a and 16a with costs. Even prayer 3 of the application at encl 5a failed to apply for any extension of time to file the record of appeal.

[24] On the preliminary objection we upheld the second part and ruled that the applicants have no standing to make this application. They have been struck out and not having appealed against such decision, they are no longer parties to this action.

[25] On the first part of the preliminary objection that since no appeal record had been filed whilst no application for extension of time had been sought and by virtue of our decision to have the applications at encls 13a and 16a to be struck out, this objection has been rendered academic.

[26] As such, it is the unanimous decision of this court that the application at encl 5a should be and is hereby struck out with no order as to costs. Similarly since learned counsel for the respondents have withdrawn their applications at encls 11a and 15a, those applications were accordingly struck out with no order as to costs as well.

A **[27]** All the orders hereby made shall not apply to the third and sixth applicants not only because they were absent in the hearing before this court but because they have filed the notice of discontinuance on 15 September 2008 as well.

B *Applications struck out with no order as to costs.*

Reported by Ashok Kumar

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